SUPREME COURT, U. S.
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No. A-1071
MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

GEORGE O. PARKER,

v.

JOHN J. McKEITHEN,
GOVERNOR OF LOUISIANA, ET AL.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENT, JOHN J. McKEITHEN, et al

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May it please the Court:

Any consideration of the desirability of granting writs of certiorari in this case should start with this court's own pronouncements on the circumstances under which they generally would entertain such writs. Insofar as it relates to decisions from the lower courts of appeal in the Federal system, Rule 19 of the Supreme Court Rules provides, in pertinent part,

> "... (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of Federal law which has not been, but should be, settled by this court; or has decided a Federal

> question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision. . . ." (Rule 19. Section 1 b)

The situation most nearly applicable to the instant case is the third one enumerated above, i.e., that the lower court has decided an important question of Federal law which has not been, but should be, settled by this court. The petitioner, however, makes no reference to such provision but rather attempts an emotional plea that he is a derelict and a criminal who has been denied all rights as a citizen to seek an adequate remedy for the wrongs committed upon him.

In the first place, the arguments advanced by petitioner are totally baseless as he has had his complaint considered by every court in the State of Louisiana and the two lower Federal courts. The simple fact that he has lost his case as not being able to establish a right to recover hardly equates to being stripped of civil rights. In the second place, this "important question of Federal law which has not been, but should be, settled by this court" can readily be settled by simply denying the application for certiorari here. Respondent suggests that the procedural method employed by the Fifth Circuit is interesting, yes even important, but not so important as to require full hearing by this court. It was a reasonable, logical, expedient procedural disposition of the case below and can be approved by this court by a denial of writs herein.

Why then should this honorable court "approve" the decision below? Under the authority of *Hyman vs. Regenstein, 258 F.2d 502*, certiorari denied sub nom.; *Hyman vs. Continental Illinois National Bank, 359 US 913, 79 S.Ct. 589, 3 L.Ed.2d 575 (1959)*, the end results on the merits will be identical, as the issue of negligence obviously is the key question to be resolved in the Federal litigation below. Judge Simpson of the Fifth Circuit, after quoting a portion of the original plantiff's claim herein, then stated:

> "this quote manifests that Parker's civil rights violation claim is premised upon his allegation that the defendants were grossly negligent in failing to protect him from being stabbed by Edmonson. If the defendants were not negligent, Parker's Section 1981-1983 claims fail. It is at this juncture that the doctrine of collateral estoppel by judgment assumes control. The factual question of negligence was fully presented to the state courts, and Parker failed to introduce even the sufficient evidence to prove the threshhold element of knowledge, much less prove that the defendants were negligent. The state court thereupon dismissed Parker's suit with prejudice. We hold that the doctine of collateral estoppel by judgment operates to prevent Parker from relitigating the issues of negligence in the Federal courts." (Parker v. McKeithen, 488 F 2d 438, at 449)

As we appreciate the complaint of petitioner herein, he does not complain about the application of the doctrine of collateral estoppel, but rather the reliance of

the Fifth Circuit on matters not officially in its record in accordance with Rule 10a (RAP) and further objects to the initiation of the "motion" on its own rather than the obviously circuitous course of having we, the defendants, file such a motion in the District Court. It is certainly apparent that such a motion would be sustained in the District Court and, if appealed, would be affirmed by the Fifth Circuit. The disposition below, therefore, arrives at the exact same place in the litigation and it is difficult for respondents to see in what way the petitioner has been denied due process.

Additionally, the difficulty presented by petitioner with the allegation that the defendants in the state action and the Federal action are not identical is without merit. In the first place, the true beneficiaries of the decision below to dismiss on the collateral estoppel argument rather than the failure to state a claim under 12(b)(6) are the individual prison officials. Petitioner erroneously concludes that it is improper for Governor McKeithen, Lt. Governor Aycock, and Speaker Garrett to likewise benefit from this decision. This position is erroneous for the simple reason that they do not need the benefit of this decision to be left out of this litigation. The Fifth Circuit held that a dismissal in the instant case for failure to state a claim under Section 1983 was in error and the judgment of the District Court based on *those* grounds must be vacated. As discussed in Footnote 8 to their opinion, they in fact vacate the judgment as to all defendants but comment that they do not review the decision as to executive and legislative immunity. Respondents, therefore, urge that

that dismissal as pertains to those three defendants is still valid, thus it is not appropriate to charge that they are the improper beneficiaries of this decision. In addition, petitioner takes issue with the dismissal below as to the named insurance company defendants. A careful review of the record in these proceedings will reveal that they had been dismissed previously on motions for summary judgment filed by their respective counsel. Fireman's Fund Insurance Company was dismissed on February 17th, 1971, on its motion for summary judgment. And Hartford Accident and Indemnity was dismissed on November 25th, 1970, on its motion for summary judgment. The basis of both of these motions was that there was utterly no insurance covering the type of liability alleged. Both policies pertain to fidelity bonds of the applicable employees. Additionally, Willie Edmonson, the real culprit herein, was never covered by either of the policies and it was totally erroneous to name Hartford Accident and Indemnity as the insurer of Willie Edmonson, a prisoner in Angola. Further, it is not correct to contend that Willie Edmonson should not be dismissed from this suit under the lower disposition. He was never a defendant in the Federal litigation in the first place and, therefore, can hardly be the recipient of an improper dismissal. If the petitioner will review his own pleadings filed herein, he will note that Hartford Accident and Indemnity was named as the insurer of Willie Edmonson and that is the only manner in which Willie Edmonson was named. In point of fact, he was listed to be served with the papers and presumably was served with the pleadings herein but nowhere does the prayer request judg-

ment against Willie Edmonson. It is thus obvious that he was not a defendant in the Federal proceedings.

The only persons that were actually still in the litigation at the time of the Fifth Circuit's opinion were Louis M. Sowers, C. Murray Henderson, Lloyd W. Hoyle, and Hayden J. Dees. It is to these defendants that the benefits of the estoppel theory flows, and properly so. The initial motion filed by defendants was for summary judgment, in which they admitted all of the facts as alleged in the petition but declared they were entitled to the judgment as a matter of law. This is still the posture that they have taken, thus it is incorrect for petitioner in this application to charge that there are still material issues of fact in dispute. That is simply not true. As the Fifth Circuit properly observed, the motion should have been styled and treated as a motion to dismiss for failure to state a claim for which relief could be granted in the Federal courts, on the theory that mere negligent conduct did not amount to a denial of rights under 1983. The respondents do not agree with the disposition of the Fifth Circuit on that question on the merits, but do agree with the restyling of their motion. Reaching that decision then brought the Fifth Circuit to the strange posture of "... trying to determine what disposition is *now* to be made of this appeal ..." (Emphasis added.) *Parker v. McKeithen*, page 41 of petitioner's brief.)

The action taken by the Fifth Circuit was the only reasonable one to take and is completely within

their broad grant of authority to do substantial justice between the parties, to efficiently manage the course of the litigation, and to supervise the lower District Courts. Petitioner really does not question the fact that the District Court would be bound by the Fifth Circuit's decision in this regard. As respondents appreciate their argument, he does not even question the application of the collateral estoppel doctrine to the case at bar. What he questions is his lack of opportunity to be heard in response to a motion initiated by the defendants herein. Well, of course, the defendants have made no such motion only because the petitioner has been appealing the decision throughout and it has yet to become final. He has kept the ball in the air, as it were, so there has been no opportunity for the defendants to make such a motion. Clearly they would do so if the position were different. What due process, then, has the plaintiff been deprived? In Section 4 of his brief he acknowledges on page 30 in Section (d) the correctness of the legal principle applied by the Fifth Circuit but then takes to task their acceptance of "facts." Petitioner charges that these are not facts at all but opinions of fact. Respondents do not understand the term "opinions of fact, arbitrarily adopted by other courts" and thus fail to see the distinction made by petitioner that the Fifth Circuit is permitted to accept facts but not distorted opinions of these facts. We believe what the petitioner is saying is simply that he fails to agree with the legal conclusion reached by all of the state courts in Louisiana and the lower Federal courts on the "facts." This is his right and it is

for that reason he has exercised so many appellate remedies. But disagreeing with the conclusion of appellate courts does not assign to their findings of fact "distorted opinions." Thus, when one reaches through the bramblebush of emotion with which the plantiff brief is charged, one finds that he actually does not take issue with the holding of *Hyman v. Regenstein*, supra, just that the Fifth Circuit applied it without giving the District Court a chance to apply it on due motion of the defendants. It accomplishes nothing to recite to this honorable court that no such motions have been filed by the defendants. We, of course, acknowledge that there has been no ordinary compliance with Rule 56 *at least insofar as these grounds*. There was, of course, original compliance but any motion initiated at this time would amount to the same substance and all facts would *again* be admitted. There is, thus, no issue of material fact, there is nothing new that the petitioner could add in any responsive appearance, and the case was ripe for decision by the Fifth Circuit.

It is submitted that the remedies chosen in the case at bar are within the authority of the Fifth Circuit, whose decision should be upheld by this court's denial of the application for certiorari.

Respectfully submitted,

WILLIAM J. GUSTE, Jr.,
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STANFORD O. BARDWELL, JR.,
Assistant Attorney General.

CERTIFICATE

I, STANFORD O. BARDWELL, Jr., Attorney for the defendants and a member of the bar of the Supreme Court of the United States, hereby certify that on this_____day of July, 1974, I served copies of the foregoing brief in opposition to petition for certiorari upon Mr. Charles R. Maloney and Mr. David L. Morgan, Jr., by mailing a copy thereof postage prepaid to their offices.

Stanford O. Bardwell, Jr.

STANFORD O. BARDWELL, JR.

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